

Memorandum 92-42

Subject: Study L-1033.01 - Heirship Proceeding Under Former Probate Code Sections 1190-1192

In 1988, the Probate Code had two sets of provisions for heirship proceedings:

(1) Sections 1080-1082 permitted a petition before final distribution in an estate proceeding to determine the persons entitled to distribution of the estate. The decree was conclusive in the estate proceeding and on distribution as to the matters determined.

(2) Sections 1190-1192 permitted a petition to determine the persons entitled to real or personal property when title "vests, other than by the laws of succession, in the heirs, heirs of the body, issue, or children of any person, without other description or means of identification." Notice was limited, and the decree had limited effect. See discussion below.

The Commission's 1988 probate bill repealed both sets of sections. It reenacted the substance of former Sections 1080-1082 as Sections 11700-11705, but did not continue Sections 1190-1192. The 1988 Comment to Section 1190 said Sections 1190-1192 were "unnecessary," and that the issues determined under the former sections could be determined in proceedings for distribution, or, if no estate proceeding is pending, by quiet title. Former Sections 1190-1192 and 1988 Comments are set out in Exhibit 2.

John Hoag, Assistant Regional Counsel for Chicago Title, says Sections 1190-1192 should not have been repealed, since they were useful to the title industry to determine in a "quick, reliable, and sensible way the identity of a person entitled to the ownership of the title to real property." He recommends the sections be reenacted. He gives an example of a deed granting a life estate to A, remainder to A's "children." He says a title insurer needs a court determination of who A's children are, and that former Sections 1190-1192 were "extremely useful" for this purpose. His letter is attached as Exhibit 1.

Limited Effect of Decree Under Former Sections 1190-1192

Because of limited notice, a decree under former Sections 1190-

1192 would seem to provide little protection to a title insurer in Mr. Hoag's example. In the 1931 Probate Code, Section 1191 only required posting of notice at the courthouse; no other notice was required. Section 1191 was amended in 1980 to require limited mailed notice. By cross-reference to Section 1200.5, notice had to be mailed to the personal representative and to persons who requested special notice or had given notice of appearance in the estate. This assumes the petition would be made in a pending estate proceeding. It does not seem to work in an heirship proceeding not in a pending estate.

The court's decree was only "prima facie evidence of the facts determined," and was conclusive only on persons acting on it "in good faith without notice of any conflicting interest." The decree merely determined a person's identity within the described class. It did not determine legal rights to property, and did not appear to provide a forum for determining conflicting claims to estate property. 2 California Decedent Estate Administration § 24.10, at 1048 (Cal. Cont. Ed. Bar 1975). A decree that did purport to try title could not constitutionally bind persons without notice. 2 B. Witkin, California Procedure *Jurisdiction* § 88-93, at 457-61 (3d ed. 1985).

A leading treatise by a title insurance company (TI Corporation) notes the risk of relying on a decree under former Sections 1190-1192: "Although the decree is stated to be conclusive in favor of persons acting in good faith, title companies usually do not insure title in reliance on such a decree without verification of the heirs' identity by independent investigation." 1 A. Bowman, *Ogden's Revised California Real Property Law* § 2.18, at 37-38 (Cal. Cont. Ed. Bar 1974).

Reasons for Repeal of Former Sections 1190-1192

In April 1986, the staff drafted a Tentative Recommendation to recodify Probate Code Sections 1190-1192. The TR continued the substance of these provisions, but broadened them to apply whenever "title to property vests in a class," not limited to cases where the class is described as "heirs, heirs of the body, issue, or children." The TR also broadened these provisions to apply where title vests by intestate succession.

Like the existing provisions, the TR provided for limited notice, and the decree had limited effect. The decree was "prima facie evidence of the facts determined" and was "conclusive in favor of any

person acting in reliance on the order in good faith without notice of any conflicting interest."

In June 1986, the TR was reviewed by Team 1 of the State Bar Probate Section, consisting of Chuck Collier, Gus McClanahan, Dick Kinyon, and Bill Schmidt. Team 1 thought these provisions were "basically satisfactory," and agreed with the staff proposal to broaden them to apply to any class description.

We sent the TR out for comment and received 23 letters approving and commenting on it (Memo 86-205). Attorney Bill Johnstone of Pasadena suggested incorporating Sections 1190-1192 into the parallel provisions in Sections 1080-1082. We also received a second report from Team 1, dated December 1986. Like Bill Johnstone, Team 1 thought it would be confusing to continue both heirship proceedings (Sections 1080-1082 and Sections 1190-1192). The Commission considered the comments in September 1987. The Minutes report:

The Commission concluded that this procedure was not needed and that it should not be included in the revised Probate Code. If a probate estate is pending, the question of whether a person is a member of a class entitled to a distribution is determined in the probate proceedings. If a probate estate is not pending, a determination that a person is within the class would not be of much use as compared with a quiet title judgment. The procedure of existing Probate Code Sections 1190-1192 does not appear to be used very frequently. To the extent that this procedure overlaps with the estate distribution procedure, it is unneeded and may be a source of confusion. Outside probate administration, other procedures are superior to the class membership procedure.

Effect of Quiet Title Judgment

A quiet title judgment has far more conclusive effect than a decree under former Sections 1190-1192. The complaint must name as defendants all persons with adverse claims. Code Civ. Proc. § 762.010. Service is the same as in civil actions generally. The plaintiff must use reasonable diligence to find and serve persons named as unknown defendants and persons joined as testate or intestate successors of a decedent. If the court is satisfied this has been done, the court orders service by publication, by posting the property, and by recording notice of pendency of the action. *Id.* §§ 763.010, 763.020. The judgment is binding and conclusive on all persons known and unknown who were parties to the action, and on all persons not parties to the action whose claim was not of record. *Id.* § 764.030.

Construction of Trusts

Sections 1190-1192 were also apparently used to determine the identity of persons entitled to take as class beneficiaries under a trust, other than a testamentary trust. See 1 A. Bowman, *supra*, §2.35, at 48. But now, under the new Trust Law, a trustee or beneficiary may petition the court to determine the identity of trust beneficiaries. Prob. Code § 17200.

Few Appellate Cases Under Former Sections 1190-1192

Although Sections 1190-1192 and their predecessor sections were in the codes for 79 years (1909 to 1988), only two appellate cases involving these sections appear in the annotations: Estate of Arguello, 92 Cal. App. 2d 520, 207 P.2d 590 (1949), and Estate of Brainard, 76 Cal. App. 2d 850, 174 P.2d 702 (1947). A third case referred to a prior heirship proceeding under these sections: Lloyd v. First National Trust & Savings Bank, 101 Cal. App. 2d 579, 225 P.2d 962 (1951).

The lack of cases may either mean that Sections 1190-1192 were seldom used, or that the judgment had so little conclusive effect that an appeal was not useful. Lack of use of these sections may also be inferred by the fact that they were repealed more than three years ago, and Mr. Hoag's letter is the first report of dissatisfaction we have received.

More Expeditious Hearing in Probate Department?

Perhaps an heirship proceeding in the probate department will face less calendar congestion than on the civil side, and thus petitioner can get a more expeditious hearing. But this does not seem to overcome the problems caused by limited notice and a judgment that does not determine property rights.

Staff Recommendation

The staff thinks that, on the basis of the information we have so far, we cannot make a convincing case for reenacting Sections 1190-1192. The staff is inclined not to go forward with Mr. Hoag's proposal. However, if the Commission thinks it profitable, we could circulate this Memorandum and Mr. Hoag's letter to other title insurers and to probate and property law practitioners, and ask for their views.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

**CHICAGO TITLE**

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File: _____
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Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Dear Mr. Sterling:

Probate Code Sections 1190 through 1192 have been repealed [19 Cal.L.Rev.Comm. Reports 1081 (1988)].

Those sections have been useful to the title industry for a long time for determining in a relatively quick, reliable, and sensible way the identity of a person entitled to the ownership of the title to real property.

The Law Revision comment to those repealed sections reads (quoted in full):

The procedure provided by former Sections 1190-1192 for determining membership in certain classes entitled to property other than by succession is omitted as unnecessary. Where proceedings for administration of a decedent's estate are pending, this issue is determined in proceedings for distribution. If proceedings for administration are not pending, an action to quiet title may be appropriate. [19 Cal.L.Rev.Comm.Reports 1081 (1988)].

Now instead of a relatively straightforward proceeding which most skilled title underwriters would accept as evidence of insurable title, title underwriters will be forced to require a quiet title action in order to provide title insurance. Further court congestion would seem to be a consequence of the repeal.

For example: Suppose you have a grant deed which grants a life estate to A and the remainder to A's children.

For title insurers, we must have a court determination of just who A's children are. We could have used (prior to repeal) Sections 1190 et seq. to answer questions about identity. Now a useful device for facilitating the transfer of real property has evidently been discarded.

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This was a useful procedure for a long time.

The Law Revision Commission comment is that Sections 1190 through 1192 are "unnecessary". This conclusory comment is not enlightening to those of us who work in transactional real property law every day. In fact, it has no intellectual content whatsoever. It is true that articulated reasons for repeal follow the "unnecessary" comment, but those reasons are fairly shallow, I think.

Sections 1190 through 1192 were extremely useful as working tools of the real estate industry.

It would seem prudent to reenact these sections.

Very truly yours,



John Hoag
Assistant Regional Counsel

JH:kk

cc: R. Klarin
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Prob. Code § 1190 (repealed 1988). Petition to determine members of class

1190. When title to real or personal property, or any interest therein, vests, other than by the laws of succession, in the heirs, heirs of the body, issue, or children of any person, without other description or means of identification of the persons embraced in such description, any person interested in such property as such heir, heir of the body, issue or child, or his successor in interest, or the personal representative of any such interested person or of his successor in interest, may file a verified petition in the superior court of the county in which the property or any part thereof is situated, setting forth briefly the deraignment of title of petitioner, a description of the property affected, and, so far as known to the petitioner, the names, ages and residences of the heirs, heirs of the body, issue or children whose identity is sought to be determined, and if any is dead or if the residence of any person is unknown, stating such facts, and requesting that a decree be entered determining and establishing the identity of the persons embraced in such general description.

Comment. The procedure provided by former Sections 1190-1192 for determining membership in certain classes entitled to property other than by succession is omitted as unnecessary. Where proceedings for administration of a decedent's estate are pending, this issue is determined in proceedings for distribution. If proceedings for administration are not pending, an action to quiet title may be appropriate.

Prob. Code § 1191 (repealed 1988). Setting for hearing; notice

1191. The clerk shall set the petition for hearing by the court and give notice thereof in the manner provided in Section 1200. The petitioner shall cause notice of the hearing to be given in the manner specified in Section 1200.5.

Comment. See the Comment to Section 1190.

Prob. Code § 1192 (repealed 1988). Hearing; conclusiveness of order

1192. At any time before the hearing any person interested in the property may answer the petition and deny any of the matters contained therein. The court shall hear the proofs offered by the petitioner and by any person contesting and must make a decree conformable to the proofs. Such decree shall be prima facie evidence of the facts determined thereby, and shall be conclusive in favor of anyone acting thereon in good faith without notice of any conflicting interest.

Comment. See the Comment to Section 1190.